
60 East 42nd Street • Suite 4700 • New York, New York 10165
T: 212.792.0048 • E: Jason@levinepstein.com

January 27, 2023

Via ECF

Hon. Cheryl Pollak, U.S.M.J.
U.S. District Court, Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

**Re: *Kociubinski v. NYC Health and Hospital Corp.*,
Case No.: 1:21-cv-02865-ENV-CLP**

Dear Honorable Judge Pollak:

This law firm represents Plaintiffs Renata Kociubinski, Penina Ben-Yosef and Yelena Mitrofanova (collectively, the “Plaintiffs”) in the above-captioned matter.

This settlement conference statement is subject in all respects to the confidentiality rules contained in Rule 408 of the Federal Rules of Evidence. Further, this mediation statement is prepared “for settlement purposes only.”

I. Introduction

Plaintiffs are three (3) of seven (7) nurses in the Catlab, Cardiology division of Defendant’s¹ and medical services and care facility known as “Coney Island Hospital”.

To quote the old aphorism – *numbers don’t lie*. Collectively, the **three (3) Plaintiffs** have a combined total of **49-years** of employment at Coney Island Hospital.² Plaintiffs allege significant, genuine, claims against Defendant as a result of unlawful wage policies.

According to the operative complaint filed on May 16, 2022 [Dckt. No. 1] (the “Complaint”, or the “*Compl.*”), Specifically, Plaintiffs would regularly work “on-call”³ and “overtime”⁴ shifts, but never received their agreed-upon rate of pay for those hours. [See *Compl.* at ¶ 29].

Plaintiffs allege significant wage and hour violations under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (“FLSA”) and Articles 6 and 19 of the New York State Labor Law (“NYLL”), for, *inter alia*, unpaid minimum wages, overtime compensation, and violations of the notice and record keeping requirements of the New York Wage Theft Prevention Act. [*Id.*].

¹ “Defendant” refers to defendant NYC Health and Hospital Corp. (d/b/a Coney Island Hospital).

² Plaintiff Kociubinski has been employed since April 1993. Plaintiff Mitrofanova has been employed August 2006. Plaintiff Ben-Yosef has been employed since November 2013.

³ When a nurse is “on-call” or on “stand-by”, they are expected to work on an as-needed, emergency basis, in response to being paged by the hospital. In other words, they are being engaged to wait during this period.

⁴ Nurses work an “overtime” shift as soon as an emergency page is received.

The Complaint alleges the following causes of action:

- First: Unpaid minimum wages under the FLSA;
- Second: Unpaid minimum wages under the NYLL;
- Third: Unpaid overtime wages under the FLSA;
- Fourth: Unpaid overtime wages under the NYLL;
- Fifth: Failure to provide wage notices under the NYLL; and
- Sixth: Failure to provide wage statements under the NYLL.

[*Id.* at ¶¶ 40-66].

II. Factual Background

Coney Island Hospital is one of a small handful of designated Percutaneous Coronary Intervention (“PCI”) Centers in New York City.⁵ A PCI is a treatment procedure⁶ for patients who are experiencing a heart attack or who may be in shock.

A. “On-Call” Shifts

As part of the hospital’s PCI program, nurses in Coney Island’s Catlab, Cardiology division are expected to work “on-call” and “overtime” shifts. An “on-call” or “stand-by” shift requires a nurse to be within thirty (30) minutes of the hospital’s vicinity. Nurses receive “on-call” shift pay as long as they are engaged to wait to be paged during this period.

In addition to their regularly scheduled hours⁷, nurses typically work “on-call” shifts, eleven (11) or twelve (12) hours per day, three (3) to five (5) days per week.

Nurses receive a separate rate of pay for “on-call” shifts, which is commensurate with their level of experience. Generally, “on-call” shift rate is equal to half of a nurse’s normal hourly rate of pay.

⁵ See https://www.health.ny.gov/statistics/diseases/cardiovascular/docs/pci_2016-2018.pdf at p. 76 (last accessed January 27, 2023).

⁶ During the procedure, a catheter is threaded up to the site of the blockage in a coronary artery. See *id.* at p. 7 (last accessed January 27, 2023).

⁷ Nurses are generally scheduled to work 150 hours / month, in order to receive “on-call” or “overtime” shifts.

B. “Overtime” Shifts

As soon as a nurse responds to an emergency page, and goes to the hospital, they receive an “overtime” shift.

Whether the procedure takes one hour, or half-an-hour, an “overtime” shift pay guarantees a nurse a minimum of *four (4)* hours of overtime, equal to 1.5x their normal hourly rate of pay.

C. Hospital Records Regarding “On-Call” and “Overtime” Shifts

On a monthly basis, the hospital’s head nurse – Alena Oxten – is responsible for drafting a schedule for the Catlab’s nursing staff. Nurses can request changes to be made, before this draft schedule is finalized and electronically inputted into the hospital’s administrative recordkeeping system – Clarvia.

Thus, the administrative recordkeeping system – Clarvia – contains a record of who is on standby, and who is not.

As soon as a PCI procedure is initiated, *i.e.*, a page is responded to, the hospital creates a “Stemmy Log.” This log contains a record of the procedure, including information on which nurses were assigned.

Thus, the “Stemmy Logs” contain a record of which nurses were responding to a page, and thus, entitled to “overtime” shift pay.

Despite the fact that the hospital was in possession of records reflecting their nurses “stand-by” and “overtime” hours worked, Defendant issued Plaintiffs pay stubs, which did not contain, *inter alia*, any indication of how Plaintiffs’ stand-by or overtime pay was calculated. A true and correct representative sample of Plaintiffs’ pay stubs is annexed hereto as Exhibit “A”.

D. Nurses are Not Being Fully and Fairly Compensated for their “On-Call” and “Overtime” Shifts

Beginning on or around September 2021, Plaintiffs noticed that they were not being fully compensated for her “on-call” shifts or “overtime” shifts.

Jawwad Butt, R.N.– then, one of five (5) nurses in the hospital’s Catlab, Cardiology division – took the initiative to raise this issue with the hospital’s management, on behalf of his fellow nurses.

i. The February 28, 2022 Meeting

On February 28, 2022, in Room 2W11, the hospital’s management attended a meeting with Jawwad Butt to discuss the issue regarding unpaid “on-call” and “overtime” shifts.

Alena Oxten, R.N., (head nurse), Darren Collington (Associate Executive Director), Patricia Copes (Assistant Director of Payroll), and Leonid “Lenny” Mericov, R.N., (Jawaad’s supervisor), attending the meeting on behalf of the hospital’s management.

Jawaad Butt, R.N. attended the meeting on behalf of the nurses in the hospital’s Catlab, Cardiology division.

During the February 28, 2022 meeting, Jawaad remarked that he had realized that the hospital’s automated system was not picking up time entries. They were either showing up “blank” or with a “9999” designation.

In response, Patricia Copes, who had received multiple complaints regarding the issue by nursing staff – *before the February 28, 2022 meeting* – pulled up Jawaad’s time sheets, mid-meeting.

Upon review, Leonid “Lenny” Mericov, R.N. acknowledged the administrative issue. He consequently determined that a further meeting with the hospital’s payroll and central office was necessary.

i. The Hospital Management’s Failure to Attend the March 31, 2022 Meeting

Leonid “Lenny” Mericov, R.N. organized a meeting to be held on March 31, 2022, to addresses the payroll issue identified by Jawaad Butt, R.N., at the February 28, 202 meeting.

Inexplicably, the hospital’s payroll and central office personnel⁸ did not attend the March 31, 202 meeting.

Reasonably frustrated, over the following several months, the hospital’s nurses continued to communicate their concerns over dozens of emails to hospital management.

ii. The May 17, 2022 Email

On May 17, 2022, Jawaad Butt, R.N., emailed his supervisors, and the hospital’s management, as follows, in pertinent part:

“I have recently update[d] the payments on excel sheet based on the last three payments received on 04/15/2022, 04/29/2022 and 05/13/2022. The date in blue is the check issued in which most of us have gotten some payment regarding this issue. We went and added all the payments to our excel sheet (**IN BLUE**) based on dates provided in details or "break down."

It is still very VERY VERRY unclear how they are breaking down these payments and we still have not received our full owed amount. We also feel that the check

⁸ i.e., Patricia Copes (Assistant Director of Payroll) and Toni Louis (Director of Payroll).

should have been administered separately with a clear breakdown of what payments were made for which dates.

PS- FROM 04/03/2022-04/30/2022 NO ONE GOT PAID ANY [Stand-By] HOURS EXCEPT YELENA MITROFANOVA AND IT WAS NOT ANYWHERE REMOTELY NEAR THE TOTAL AMOUNT OWED TO HER FOR THAT PERIOD. SO I FEEL THE ISSUE IS CONTINUED !! ALSO PENINA DID NOT RECIEVE ANY COMPENSATION FROM MISSING [Stand-By] HOURS.“

(Emphasis in original). A true and correct copy of the May 17, 2022 email is annexed hereto as Exhibit “B”.

In the May 17, 2022 email, Jawaad Butt, R.N. attached an excel spreadsheet reflecting: (i) “stand-by” and “overtime” shifts worked from approximately February 2021 and April 2022; and (ii) compensated received for “stand-by” and “overtime” shifts during this same time. A true and correct copy of the excel spreadsheet is annexed hereto as Exhibit “C”.

iii. The May 26, 2022 Email

On May 26, 2022, Jawaad Butt, R.N., emailed his supervisors, and the hospital’s management, as follows, in pertinent part:

Cath lab Nurses have not seen complete compensation for past hours missed yet and some of us have **not seen any previous balances** paid as of 05/26/2022. Please we **DO NOT WANT THIS ISSUE** to continue it makes it very difficult to want work for HHC. Please I need this issue to be resolved for good. We are being treated like a joke and it needs to stop. Thank you !

(Emphasis in original). A true and correct copy of the May 26, 2022 email is annexed hereto as Exhibit “D”.

iv. The May 31, 2022 Email

On May 31, 2022, Jawaad Butt, R.N., emailed his supervisors, and the hospital’s management, as follows, in pertinent part:

“I am representing the entire nursing staff of the Cath lab. It is unacceptable that no one has responded to any of my emails, ESPECIALLY finance and those in charge of payroll. I am bringing to your attention that we are still not receiving compensation for our hard work put in to keep this community STEMI center active. Two of the Nurses (Yelena Mitrofanova and Penina Ben-Yosef) have not been compensated at all for the money owed for the past hours that were entered into time sheets and further detailed in spread sheets provided for stand by and Overtime. In addition to that 3 weekends ago Ben-Yosef and Renata Kociubinski

both were activated 5 times over one weekend and have not received any compensation for there time given to this establishment. I also noticed on my own time sheet 2202 and 2203 have errors and have not been processed because the FAULTY/MESSED UP system did not "PICK UP" my time entry and displays the message of "9999." According Mrs. Copes this means that the system is unable to comprehend a simple time entry and it is out of their hands. Please have this issue resolved or we will escalate further to dept. of labor and we already have contacted the Union and outside private lawyers.

PS. WE WOULD LIKE A CLEAR CUT TANSSPARENT BREAK DOWN OF PAYMENTS ON OUR CHECK BECAUSE WE DO NOT TRUST ANY OF THE PEOPLE PROCESSING OUR TIME SHEETS. We also deserve to have these owed balances on separate checks with CLEAR break down!!!!!!.

THIS IS A SERIOUS MATTER AND IT IS NOT BEING ADDRESSED AFTER MONTHS OF ATTEMPTS OF TRYING TO RESOLVE THE ISSUE."

(Emphasis in original). A true and correct copy of the May 31, 2022 email is annexed hereto as Exhibit "E".

v. The June 2, 2022 Email

On June 2, 2022, Jawaad Butt, R.N., emailed his supervisors, and the hospital's management, as follows:

"I wanted to give my own example of what is a continuous issue with the payment of stand by and now Overtime as well. I received my last paycheck on 05/27/2022, in which I was paid \$1,184.25 for stand by time "Ern End Date," of 04/30/2022 (which includes 04/03/2022 untill 04/30/2022). According to clarvia I did 190 hours of overtime and stand-by hours combined, out of which 28 hours were overtime hours. 190 hours total (overtime and stand-by) minus 28 hours overtime yields 162 hours of stand-by hours completed from 04/03/2022 until 04/30/2022.

It is now **JUNE 2022** and I have only been paid for 50.75 hours of stand-by for the month of **APRIL 2022** at a stand-by rate of \$23.33 per hour. STAND-BY should be paid **EVERY CHECK** it is not overtime. **Also OVERTIME HAS NOT BEEN PAID FOR THE MONTH of April 2022 at all.** It is now June 2022 and this has become a ridiculous situation and I am attaching my paystub with a "break down," which is not transparent at all. I also attached my clarvia hours of stand-by and overtime.

This is just any example of the continued on going issue that is affecting all the staff nurses in the Cath lab. Please I request we have a meeting between administration, payroll, finance, medical and Nursing staff. We can not continue to

work in such conditions it is unethical and it is abuse, it has been over 6 months we have been addressing this issue and it has not been resolved.”

(Emphasis in original). True and correct copies of the June 2, 2022 email, with the referenced attachment, is annexed hereto as Exhibit “F”.

vi. The June 3, 2022 Email

On June 3, 2022, Plaintiff Yelena Mitrofanova, R.N., emailed her supervisors, and the hospital’s management, as follows, in pertinent part:

“My name is Yelena Mitrofanova and I am one of the nurses at Coney Island Hospital’s Cardiac Cath Lab. It has been months and our nurses have not yet to receive a comprehensive explanation as to what happened to the payments that we are owed for Stand by and Overtime. We have not been adequately compensated for time worked by H+H. Furthermore, the paychecks that we do receive, are not transparent and are oftentimes confusing and we would like some clarity. We have contacted Payroll Department of our hospital and Central office and to no avail and without any resolution of the matter. We would like abstain from filing a complaint with the NY Labor Department for the unpaid wages, and work this matter out internally. Please advise.”

A true and correct copy of the June 3, 2022 email is annexed hereto as Exhibit “G”.

vii. The June 9, 2022 Email

On June 9, 2022, Plaintiff Penina Ben-Yosef, R.N., emailed her supervisors, and the hospital’s management, as follows, in pertinent part:

“This is not the first, second, or third email sent from cath lab nursing staff members regarding this issue. We have sent multiple emails without receiving any response as we are continuously not being paid appropriately for our standby hours worked while working on call after hours. It is unethical to expect staff to continue working while not being paid without further detailed explanation and reasoning.

...No one should be expected to work without being properly paid for the time invested. Please respond in a timely manner to set up a meeting with the cath lab nurses.”

A true and correct copy of the June 9, 2022 email is annexed hereto as Exhibit “H”.

viii. The July 12, 2022 Email

On July 12, 2022, Plaintiff Yelena Mitrofanova, R.N., emailed her supervisors, and the hospital’s management, as follows, in pertinent part:

To who it may concern,

Some of Cath lab staff RN's still have not been compensated for money owed to us by this institution. My colleague Penina Ben-Yosef sent out an email weeks ago with no response or corrective action from higher authorities to solve our situation. A meeting was promised to us by central office which was never held and no follow up. We have navigated through all of the appropriate roads to attempt to resolve this issue and still 6 months later we are begging for money owed to us for our work. In addition to Penina and I not getting any of the compensation owed to us, other staff members have not received the full amount of money which is owed to them as well. We are entitled to a full explanation according to the department of labor. This is not ethical and is a matter that needs to be taken seriously. This is very discouraging as staff in this hospital.

We expect an answer."

A true and correct copy of the July 12, 2022 email is annexed hereto as Exhibit "I".

III. Defendant's Incomplete Document Production

As of the date of this filing, Defendant has only produced 64 individual pages consisting of Plaintiffs' incomplete payroll records. As previously mentioned, and as reflected in Plaintiffs' email correspondence to the hospital, the pay stubs do not contain any indication of how Plaintiffs' stand-by or overtime pay was calculated.

As of the date of this filing, Defendant has not produced any:

1. Clarvia records;
2. Stemmy logs; or
3. Internal emails in regards to the instant dispute.

IV. Conclusion

That three (3) employees have banded together in this case is indicative of Defendant's historical exploitative management. Defendants' abusive tactics have continued and surfaced after this case was filed on May 17, 2022.

Defendant's liability is not questionable. Plaintiffs are a group of current employees who are intelligent and knowledgeable about the claim and can speak, with documentary support, about Defendant's payroll and timekeeping practices. No realistic substantive defenses to the claims have been proffered during the litigation.

Thank you, in advance, for your consideration of this matter.

LEVIN EPSTEIN & ASSOCIATES, P.C.

By: /s/ Jason Mizrahi
Jason Mizrahi, Esq.
60 East 42nd Street, Suite 4700
New York, NY 10165
Telephone: (212) 792-0048
Jason@levinepstein.com
Attorney for Defendants